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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CHRISTIAN MARTINEZ, Defendant and Appellant.	D053169 (Super. Ct. No. SCD207602)

APPEAL from a judgment of the Superior Court of San Diego County, John M. Thompson, Judge. Affirmed as modified.

Christian Martinez was convicted of two counts of robbery involving two different incidents, one occurring on June 26, 2007 (count 3), and the other on July 2, 2007 (count 1). On appeal, he raises arguments challenging the count 3 conviction for the June 26 robbery. He contends (1) there is insufficient evidence to support the jury's finding that he used force or fear, and (2) the trial court should have instructed the jury regarding the lesser included offense of grand theft of the person. We conclude the record supports the

jury's finding that Martinez used force or fear. Further, even if the trial court was required to give a theft instruction, the error was harmless. Accordingly, we affirm the count 3 robbery conviction.

The jury acquitted Martinez of a charged offense of assault with a deadly weapon against a third person (Mohmoud Guled) on July 2 (count 2). On appeal, Martinez asserts the trial court improperly ordered Guled was entitled to restitution. We agree, and accordingly modify the judgment by striking the restitution order for Guled.

FACTUAL AND PROCEDURAL BACKGROUND

Because Martinez only challenges his conviction for the robbery that occurred on June 26, we confine our initial summary of the facts to that offense. We will set forth facts relevant to the incidents that occurred on July 2 in our later discussion of the restitution order.

At about 8:15 p.m. on June 26, 2007, Hassan Maike, who is Somali, had parked his car and was walking to the Al-Ansar mosque where he regularly goes to pray. Maike was listening to his iPod with a headset, with one earpiece in his ear and the other earpiece hanging down. As he was nearing the mosque, he saw three Hispanic men standing behind a car parked on the street. As Maike was passing by the men, Martinez grabbed the earpiece from Maike's ear. Maike held onto his iPod (which was in his pocket) and turned around to face Martinez. Martinez succeeded in taking the headset, while the iPod remained in Maike's pocket. As Maike turned to face Martinez, Maike was punched in the ear, apparently by one of the other Hispanic men (the second

Hispanic man).[1] The third Hispanic man was behind Martinez and the second Hispanic man.

After he was punched in the ear, Maike grabbed his ear and looked around, feeling dizzy. Martinez and the second man were standing in front of him trying to fight him. Martinez had wrapped Maike's headset in his hand and was making jabbing motions toward Maike, saying, "Come on. Try to come to me to punch me." Maike stepped back while Martinez continued to come towards him to fight him.

Maike felt afraid because he thought the three men were going to come and beat him. He did not make any efforts to recover the earpiece, but ran several feet away and dialed 911 on his cell phone. Another Somali man (Afey Ali) came out of some nearby apartments and asked the Hispanic men what they were doing. One of the Hispanic men punched Ali. Other Somalis arrived at the scene, and as the altercation continued the third Hispanic man fired a gun into the ground.[2] After this, the Hispanic men ran inside the apartment complex. While this was occurring, Maike remained on the phone with the 911 operator describing what was unfolding.

In defense, Martinez argued that the prosecution's identification evidence was not credible because of inconsistencies. He also disputed allegations that he personally used

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1 In pretrial statements, Maike at times stated Martinez was the person who punched him. At trial, he testified he thought it was the second Hispanic man who punched him, although he was not sure.

2 Maike testified that the third Hispanic man fired the gun, whereas another witness testified Martinez fired the gun. The jury found not true an allegation that Martinez personally used and discharged a firearm during this incident.

and discharged a firearm during the incident. The jury convicted Martinez of the count 3 robbery, with a true finding that a principal was armed with a firearm and not true findings that Martinez personally used and discharged a gun.

DISCUSSION

I. *Sufficient Evidence of Use of Force or Fear*

Martinez challenges his count 3 robbery conviction, contending there is insufficient evidence that he used force or fear during the taking of Maike's headset. He asserts the record merely shows that he took the property, and then—unconnected to the retention of the property—he participated in an assault against Maike that was reflective of the ongoing tension between Hispanic and Somali communities in the neighborhood.

In evaluating a challenge to the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether there is substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) We presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*Ibid*.) If the circumstances reasonably justify the jury's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*Id.* at p. 358.)

Robbery is the taking of property in the possession of another, from his or her person or immediate presence, accomplished by force or fear and with the intent to

permanently deprive the victim of the property. (Pen. Code,[3] § 211; *People v. Zamudio, supra,* 43 Cal.4th at p. 356; *People v. Marshall* (1997) 15 Cal.4th 1, 34.) The taking element of robbery includes both the gaining possession and carrying away of the property. (*People v. Gomez* (2008) 43 Cal.4th 249, 255-257.) Although only slight movement is necessary to establish the carrying away element, a robbery remains in progress until the property is carried away to a place of temporary safety. (*Ibid*.; *People v. Flynn* (2000) 77 Cal.App.4th 766, 772.) Thus, the force or fear element is satisfied if force or fear is used during either the gaining of possession of the property or the carrying away of the property. (*Gomez, supra,* at p. 257; *Flynn, supra,* at pp. 771-772.) Gaining possession or carrying away "includes forcing or frightening a victim into leaving the scene, as well as simply deterring a victim from preventing the theft or attempting to immediately reclaim the property." (*Flynn, supra,* at p. 771)

To establish robbery, the defendant must form the intent to steal either before or during the use of force or fear, and "'must apply the force [or instill the fear] for the purpose of accomplishing the taking.'" (*People v. Zamudio, supra,* 43 Cal.4th at p. 356; *People v. Marshall, supra,* 15 Cal.4th at p. 34.) The "wrongful intent and the act of force or fear 'must concur in the sense that the act must be motivated by the intent.'" (*People v. Marshall, supra,* at p. 34.) If the defendant uses force or fear to accomplish retention of the property after it is seized, the crime of robbery is committed. (*People v. Flynn, supra,* 77 Cal.App.4th at pp. 769, 772.)

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3 Subsequent statutory references are to the Penal Code.

Here, there is no dispute that the record shows the overall incident on June 26 involved the use of force or fear; the only question is whether the jury could reasonably conclude that Martinez used the force or fear for the purpose of accomplishing the taking. There is ample evidentiary support for this finding. According to Maike's description of the incident, Martinez snatched Maike's headset, and then, as Maike turned his head, one of the Hispanic men immediately struck Maike in the ear, followed by Martinez's challenge to Maike to fight. Thus, the grabbing of the property was followed by an instantaneous punching and challenge to fight. Given that the gaining of possession and the assaultive conduct occurred almost simultaneously, the jury could reasonably infer that the assault and taunts to fight were designed to allow Martinez to retain the property by preventing Maike from reclaiming it. That is, the jury could find that Martinez intended the show of force to communicate to Maike that he could not reacquire the property without risking serious bodily injury.

To support his assertion that the assault was separate from the taking, Martinez notes that he and his companions did not flee in an attempt to retain the headset. This fact is not fatal to the jury's finding that Martinez committed the assault as a means to retain the property. The jury could consider that Maike was outnumbered by Martinez and his companions, and thus it was not necessary to immediately flee to retain the property. Further, the jury was not precluded from inferring that Martinez had a dual motive during the show of force—i.e., to communicate to Maike that he could not reclaim the property *and* to harass Maike. The possibility that Martinez stayed in the area because he wanted to harass Maike does not detract from the evidentiary support for the

finding that Martinez also wanted the assaultive conduct to facilitate his retention of the property.

Martinez also contends the use of force or fear is not shown because Maike made no attempt to retake the headset. The contention is unavailing. As noted in *People v. Flynn*, "When the perpetrator and victim remain in close proximity, a reasonable assumption is that, if not prevented from doing so, the victim will attempt to reclaim his or her property." (*People v. Flynn*, *supra*, 77 Cal.App.4th at p. 772.) The fact that Maike refrained from trying to regain his property supports that he was afraid to do so, and does not undermine the inference that Martinez participated in the show of force to accomplish his retention of the property.

Martinez further points out that he and his companions did not try to take the iPod or any other property of value from Maike. A taking of property by force or fear constitutes robbery even if the value of the property is slight. (*People v. Simmons* (1946) 28 Cal.2d 699, 705.) Thus, it was not necessary that Martinez take additional property. The fact that he did not demand additional property may reflect that his motive for the robbery was harassment rather than acquisition of wealth, but it does not defeat the evidentiary support for the conclusion that Martinez intended that the force or fear effectuate his retention of the property.

The record supports the use of force or fear to establish the count 3 robbery.

II. *No Duty to Instruct on Lesser Included Theft Offense*

Martinez argues the trial court should have sua sponte instructed the jury on the lesser included offense of grand theft of the person because the jury could reasonably find he did not use force or fear when taking the property.

"'It is well settled that the trial court is obligated to instruct on necessarily included offenses—even without a request—when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense.'" (*People v. Gray* (2005) 37 Cal.4th 168, 219.) "When evidence substantial enough to merit the jury's consideration is presented to show a crime may be less than that charged, the trial court must instruct on the lesser crime." (*Id.* at p. 219, fn. 13.) Generally, the erroneous failure to instruct on a lesser included offense requires reversal only if it is reasonably probable the jury would have returned a different verdict in the absence of the error. (*People v. Rogers* (2006) 39 Cal.4th 826, 867-868.) When evaluating prejudice, the reviewing court may consider whether the strength of the evidence supporting the existing judgment is relatively strong, and the evidence supporting a different outcome is so comparatively weak, that there is no reasonable probability the error affected the result. (*Id*. at p. 870.)

Theft is a lesser included offense of robbery; robbery includes the added element of force or fear. (*People v. DePriest* (2007) 42 Cal.4th 1, 50.) Force for robbery must be more than "'just the quantum of force which is necessary to accomplish the mere seizing of the property.'" (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246, disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 2.)

As stated, there is no dispute that the overall incident described by the prosecution witnesses involved force or fear. Assuming arguendo the evidence can support an inference that the force or fear was distinct from the taking so as to warrant a grand theft of the person instruction, the error was harmless. The record strongly supports an inference that the force or fear was "part and parcel" of the taking. The gaining of possession of the property was instantaneously followed by a physical assault upon Maike. Through the assault, Martinez and his companions clearly communicated to Maike that he would not be permitted to reclaim his property without a fight. Given the close temporal proximity between the seizure of the headset and the punch, it is highly unlikely the jury would have found that Martinez did not intend that the assaultive conduct effectuate the retention of the property. As noted, the fact that Martinez may have taken the property for purposes of harassment rather than to gain something of substantial value does not diminish the strong evidentiary support for a finding that he engaged in the assaultive conduct to keep the property.

Assuming arguendo there was sufficient evidence to support a theft instruction, the failure to give the instruction was harmless given the strength of the inference that the force or fear was designed to accomplish the retention of the property.

III. *Restitution Order*

Martinez argues the trial court mistakenly ordered restitution for Mohmoud Guled, the alleged victim in a count for which the jury found him not guilty. We agree.

Martinez was charged with committing robbery against Bahasan Noor on July 2, 2007 (count 1) and assault with a deadly weapon on Guled on that same date (count 2).

The prosecution's theory was that on July 2 Martinez robbed Noor at the Al-Ansar mosque, and then shortly thereafter tried to stab Guled, who was also at the mosque. Noor testified that at about 8:30 p.m. on July 2, he was outside the mosque installing a security camera, when Martinez, accompanied by three other men, revealed a gun and demanded money from Noor. Noor gave Martinez the loose change that he had. Martinez demanded an iPod from Noor, and one of Martinez's companion displayed a knife and took Noor's tool bag. When some mosque attendees heard what was occurring and came outside, Martinez and his companions ran away into a nearby apartment complex. Noor went into a patio area of the mosque and called 911. About five minutes later, Noor heard a commotion by the front entrance of the mosque. A group of Hispanic men were throwing objects towards the mosque as mosque attendees were leaving the mosque after their prayers. Noor and the other mosque attendees ran back into the mosque for safety. Noor did not see Martinez among the assailants throwing the objects. Guled, who was at the mosque while this was occurring, testified that one of the Hispanics (who he identified as Martinez) repeatedly tried to stab him with a knife at the mosque. As with the June 26 offense, Martinez argued his guilt was not proven beyond a reasonable doubt because of inconsistencies in the prosecution's identification evidence.

The jury convicted Martinez of the July 2 robbery of Noor, but acquitted him of the July 2 assault with a deadly weapon against Guled.

The probation officer's report recommended that probation be denied, that Martinez be sentenced to prison, and that the trial court order Martinez to pay restitution to the victims, including to Guled in an amount to be determined by the court. At

sentencing, the trial court sentenced Martinez to 13 years in prison, and ordered restitution to be paid to the victims of the June 26 and July 2 robberies (Maike and Noor) under section 1202.4, subdivision (f). As recommended in the probation report, the trial court also awarded restitution to Guled under section 1202.4, subdivision (f) in an amount to be determined by the court. The abstract of judgment reflects the court's award of restitution to Guled in an amount to be determined.

Section 1202.4 is intended to provide restitution to a victim "who incurs any economic loss as a result of the commission of a crime" from "*any defendant convicted of that crime*." (§ 1202.4, subd. (a)(1), italics added.) Section 1202.4, subdivision (f) states that in every case "in which a victim has suffered economic loss *as a result of the defendant's conduct*, the court shall require that the defendant make restitution to the victim . . . ." (Italics added.) Section 1202.4 limits restitution awards to losses arising out of criminal conduct for which the defendant has been convicted. (*People v. Percelle* (2005) 126 Cal.App.4th 164, 178-180; *People v. Woods* (2008) 161 Cal.App.4th 1045, 1049.) Although a defendant who is granted probation can be ordered to pay victim restitution for a crime of which he or she was acquitted, this rule is not applicable when the defendant is sentenced to prison and restitution ordered under section 1202.4. (*People v. Percelle, supra*, at pp. 179-180). Unless the victim's loss arises from a crime of which the defendant was convicted, there is no basis to award restitution under section 1202.4. (*People v. Percelle, supra*, at p. 180-181; *People v. Woods, supra,* at p. 1053.)

Here, Martinez was acquitted of the charged crime involving Guled. Accordingly, there was no basis to award restitution to Guled under section 1202.4.

The Attorney General argues that the restitution order on behalf of Guled is not ripe for review because the court has not yet ordered any amount for Guled. Although stating that it is unlikely that any restitution will be awarded to Guled because the record does not reveal that he suffered any harm, the Attorney General suggests that there could be economic loss to Guled arising from the Noor robbery of which Martinez was convicted. However, the Attorney General fails to explain how Guled suffered loss from the Noor robbery.

Absent a showing that Guled was a victim of a crime of which Martinez was convicted, there is no basis to award restitution to Guled under section 1202.4. This portion of the restitution order must be stricken from the judgment.

DISPOSITION

The judgment is modified to strike the restitution order for Mohmoud Guled. The trial court is directed to prepare an amended abstract of judgment reflecting this change and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

HALLER, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.